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**XPO Logistics Freight, Inc. and International Brotherhood of Teamsters (IBT) Local 100, Petitioner.**  
Case 09–RC–262066

March 23, 2021

**DECISION ON REVIEW AND ORDER REMANDING**

BY MEMBERS KAPLAN, EMANUEL, AND RING

On June 23, 2020,<sup>1</sup> the Petitioner filed a petition seeking to represent a unit of the Employer’s driver sales representatives. Pursuant to a Stipulated Election Agreement, a mail-ballot election was conducted from July 27 to August 17. The Tally of Ballots shows 54 for and 60 against the Petitioner, 2 challenged ballots, and 6 void ballots. The Petitioner thereafter filed timely objections.

On September 16, the Regional Director issued a Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots (Decision). Then, in accordance with Section 102.67 of the National Labor Relations Board’s Rules and Regulations, the Employer filed a timely request for review of the Regional Director’s Decision. The Petitioner filed an opposition. The Regional Director thereafter postponed the hearing on the challenged ballots, pending the Board’s ruling on the Employer’s request for review.

The Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the Employer’s request for review and the Petitioner’s opposition, we find, as explained below, that the Regional Director erred in finding that the Regional Office potentially disenfranchised one voter by failing to send that voter a duplicate ballot kit, and that he incorrectly concluded that a physically altered ballot should be counted for the Petitioner. Accordingly, we grant review and reverse the Regional Director’s findings with respect to those two ballots.

**Background**

On July 27, the Regional Office sent approximately 132 eligible voters mail-ballot kits. Each kit included instructions for returning the ballot. As relevant here, the instructions stated that voters must put their ballots into a blue envelope, place the blue envelope into a yellow return envelope, and sign the back of the yellow envelope in the space provided. The instructions warned voters that the yellow return envelope must be signed for the ballot to be

counted. Voters were required to return their ballots by August 17. Ballots were scheduled to be counted on August 18.

On August 6, the Regional Office received one ballot in an unsigned yellow envelope. On August 11, the Regional Office received two more ballots in unsigned envelopes, and one ballot with the voter’s name printed, rather than signed, on the yellow envelope. On August 14, the Regional Office received another ballot in an unsigned yellow envelope. The Regional Office did not send duplicate ballot kits to any of these voters.

On August 18, a Board agent conducted the ballot count. The Board agent voided the four ballots returned in unsigned envelopes and the ballot returned in an envelope with a name printed on it. In addition, the Board agent voided a ballot that was not returned intact. Specifically, that ballot had a marking in the “Yes” square, but it was torn in half and the other side of the ballot was not returned to the Regional Office. Additionally, at the ballot count, the Employer challenged two voters, alleging that their dates of employment did not satisfy the stipulated eligibility criteria. As noted above, the resulting Tally of Ballots shows 54 for and 60 against the Petitioner, 2 challenged ballots, and 6 void ballots, and the Petitioner timely filed six objections.

In his September 16 Decision, the Regional Director sustained Petitioner’s Objections 1 and 2, which alleged that the Regional Office did not send duplicate ballot kits to the voters who returned their mail ballots in an unsigned envelope or an envelope with a printed name, and he also sustained Petitioner’s Objection 5, which alleged that the physically altered ballot should be counted for the Petitioner.<sup>2</sup> The resulting revised ballot count showed 55 for and 60 against the Petitioner, 2 challenged ballots, 4 voided ballots belonging to the voters who sent unsigned return envelopes, and 1 voided ballot belonging to the voter who printed his name on the return envelope. Instead of setting the election aside, the Regional Director scheduled a hearing to resolve the challenged ballots because the Regional Office’s failure to send duplicate ballot kits with respect to the five voided ballots could not affect the election’s result if both challenges were sustained.

In its request for review, the Employer contends that in sustaining Petitioner’s Objection 1, the Regional Director made factual findings that are clearly erroneous and prejudicial, and that in sustaining Petitioner’s Objections 2 and 5, the Regional Director departed from Board precedent. The Employer also contends that a hearing on the

inside the blue envelope, that the Board agent damaged a ballot, and that two ballots were not received by the ballot count. No party has requested review of that part of the Regional Director’s Decision.

<sup>1</sup> All dates hereinafter are in 2020 unless otherwise noted.

<sup>2</sup> The Regional Director overruled Petitioner’s Objections 3, 4, and 6, which alleged that the Board agent incorrectly voided a ballot not placed

challenged ballots is not warranted because there is no dispute over the eligibility of the voters at issue.

As explained in detail below, we find merit in some of the Employer's contentions, reverse the Regional Director's Decision and overrule the Petitioner's objections in part, find it unnecessary to pass on certain findings in the Regional Director's Decision, find the issue pertaining to the Regional Director's scheduling a hearing on the challenged ballots moot, and remand the case to the Regional Director for further action consistent with this decision.

#### Discussion

##### I. OBJECTION 1: BALLOTS RETURNED IN UNSIGNED ENVELOPES

Petitioner's Objection 1 alleged that the Regional Office failed to send duplicate ballot kits to four voters who returned ballots in unsigned yellow envelopes. The Regional Director found, in agreement with the Petitioner, that the Regional Office had sufficient time to furnish these voters with duplicate ballot kits. In so finding, the Regional Director noted that these voters lived in the same county as the Regional Office or in an adjacent county. Citing *Davis & Newcomer Elevator Co.*, 315 NLRB 715 (1994), and Section 11336.4(b) of the Board's Casehandling Manual (Part Two), Representation Proceedings (CHM),<sup>3</sup> the Regional Director concluded that the Regional Office potentially disenfranchised these four voters by failing to send them duplicate ballot kits. The Regional Director accordingly sustained Petitioner's Objection 1.

The Employer contends in its request for review that the Regional Office had no obligation to send these voters duplicate ballot kits because there was insufficient time to do so. We find merit in this contention with respect to the ballot that arrived at the Regional Office on Friday, August 14. Even if the Regional Office had mailed a duplicate ballot kit to the voter that Friday, post-office personnel would have had to deliver the kit from its drop-off point to the voter, the voter would have had to execute the ballot and deposit the kit in a mailbox or at a post office, and post-office personnel would have had to deliver the completed kit from its drop-off point to the Regional Office in time to count. Contrary to the Regional Director, we find it implausible to conclude that these procedures could have been completed on time, even if the voter lived in the same county as the Regional Office or in an adjacent county, particularly during a time when the postal service was experiencing severe delays.<sup>4</sup> As there was insufficient

time for the Regional Office to send a duplicate ballot kit to this voter, we find that this case is distinguishable from *Davis & Newcomer Elevator*, above, where there was no basis to dispute that there was sufficient time left for the Regional Office to furnish a duplicate ballot kit. We accordingly reverse the Regional Director and find that the Regional Office did not potentially disenfranchise this voter.

##### II. OBJECTION 5: PHYSICALLY ALTERED BALLOT

Petitioner's Objection 5 alleged that the Board agent erred in voiding the ballot that was marked "Yes" because the right side of the ballot was missing. The Regional Director sustained this objection and found that the ballot should be counted for the Petitioner, notwithstanding the physical alteration, because the submitted portion expressed a clear preference for the Petitioner and there were no markings that either negated that preference or identified the voter. In so finding, the Regional Director stated that he was applying the principles set forth in *Providence Health & Services-Oregon d/b/a Providence Portland Medical Center*, 369 NLRB No. 78 (2020) (*Providence Portland Medical Center*), and *Daimler-Chrysler Corp.*, 338 NLRB 982 (2003).

The Employer contends that the Regional Director's conclusion departs from the Board's decision in *Midland Steamship Line, Inc.*, 58 NLRB 1091 (1944), and that his analysis is contrary to principles set forth in *Providence Portland Medical Center* and *Daimler-Chrysler*. For the reasons set forth below, we find merit in the Employer's contention and we reverse the Regional Director's finding that this ballot should be counted.

"The Board's primary goal, in a representation election, is to protect the right of individual employees to choose whether or not to be represented by a union." *Daimler-Chrysler*, above at 982 (citing *General Shoe Corp.*, 77 NLRB 124, 127 (1948), *enfd.* 192 F.2d 504 (6th Cir. 1951)). To effectuate that goal, the Board assumes that, by casting a ballot, a voter evinces an intent to participate in an election and to register a preference, and the Board gives effect to this preference whenever possible. *Id.* The Board, however, avoids speculation or inference regarding the meaning of physical alterations to a ballot. *Id.* at 983. Thus, a ballot torn in half is void, even if the voter indicated a preference on the ballot. See *Midland Steamship Line*, above at 1092 & fn. 3 (affirming Regional Director's finding that a ballot torn in half was void notwithstanding

<sup>3</sup> Sec. 11336.4(b) of the CHM states that "[i]f a ballot envelope is returned without signature, the election administrative professional should, if sufficient time remains before the deadline, send a duplicate kit with a letter explaining that failure to sign voids a returned ballot."

<sup>4</sup> We find it unnecessary to pass on whether the Regional Director erred by using the date of the ballot count (August 18) rather than the

date on which the Stipulated Election Agreement required completed ballots to be returned (August 17) as the relevant endpoint for calculating whether there was sufficient time to mail out and receive back a duplicate ballot. Either way, there was not sufficient time in this case.

a mark indicating a vote for one participating union); *Daimler-Chrysler*, above at 982–983 (establishing that “speculation or inference regarding the meaning of atypical ‘X’s, stray marks, or *physical alterations*” should be avoided) (emphasis added).

Contrary to the Regional Director, we find that a ballot torn in half is void. *Midland Steamship Line*, above. In reaching a different conclusion, the Regional Director misapplied *Providence Portland Medical Center* and *Daimler-Chrysler*. Both of those decisions plainly state, as noted above, that the Board avoids speculation or inference regarding the meaning of physical alterations to a ballot. The Regional Director necessarily had to resort to speculation as to the possible meaning of the voter’s physical alteration to the ballot at issue here. As the voter’s intent cannot be determined without resorting to speculation, we reverse the Regional Director and find that the ballot is void.

### III. DISPOSITION OF PETITIONER’S OBJECTIONS AND EMPLOYER’S CHALLENGES

Based on our finding above that the physically altered ballot should not be counted, we overrule Petitioner’s Objection 5. Based on our finding that the Regional Office did not potentially disenfranchise the voter whose ballot arrived at the Regional Office on August 14 in an unsigned return envelope, we also overrule this aspect of Petitioner’s Objection 1. Resolving these issues in this manner will result in 54 votes for the Petitioner and 60 votes against representation, with 2 challenged ballots and 4 void ballots encompassed by Objection 2 and aspects of Objection 1, which we have not addressed. As these six ballots are no longer potentially outcome determinative, we need not pass on the Regional Director’s findings

pertaining to the other ballots that were returned in unsigned envelopes or in an envelope with a printed name, and we find that the issue pertaining to the Regional Director’s scheduling a hearing on the challenged ballots is moot.

### ORDER

The Regional Director’s Decision on Objections, Order Directing Hearing and Notice of Hearing on Challenged Ballots is reversed in part. Petitioner’s Objection 1 is overruled with respect to the allegation concerning the ballot received on August 14, 2020, and without passing on the Regional Director’s findings pertaining to that objection’s remaining allegations. Petitioner’s Objection 5 is overruled in its entirety. The issue pertaining to the Regional Director’s scheduling a hearing on the challenged ballots is moot. The case is remanded to the Regional Director for further action consistent with this decision.

Dated, Washington, D.C. March 23, 2021

Marvin E. Kaplan,	Member
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William J. Emanuel,	Member
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John F. Ring,	Member
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